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## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made and entered into as of the last date appearing on the signature page hereto, by and between THE SAN DIEGO UNIFIED PORT DISTRICT, a public agency ("District"), SAN DIEGO BAYKEEPER, a non-profit environmental organization ("Baykeeper"), and SURFRIDER FOUNDATION, SAN DIEGO CHAPTER, a non-profit environmental organization ("Surfrider").

### RECITALS

WHEREAS, on 24 May 1995, the California Regional Water Quality Control Board, San Diego Region ("Regional Board"), issued Cleanup and Abatement Order No. 95-21, as revised and amended ("CAO"), requiring dischargers Campbell Industries ("Campbell") and its parent company, Marine Construction and Design Company, to remediate contaminated bay sediment at the former Campbell Shipyard, situated at the foot of Eighth Avenue and Convention Way in San Diego, to cleanup levels as set forth therein;

WHEREAS, on 8 August 2000, the District assumed direct control of the remediation actions required under the CAO, in accordance with the terms of a Lease Termination Agreement entered into between the District and its former tenant, Campbell, on 16 November 1999;

WHEREAS, on 2 December 2003, the District's Board of Port Commissioners certified the Final Supplemental Environmental Impact Report for the Campbell Sediment Remediation and Aquatic Enhancement, District Document No. 46748 ("FSEIR"), and approved the proposed project to remediate the sediment by constructing a 9.2-acre engineered cap over the contaminated sediments ("Proposed Project");

WHEREAS, on 10 August 2004, the District's Board of Port Commissioners conducted a public hearing on the application for a Coastal Development Permit ("CDP") for the Proposed Project, and after comments from several representatives of local environmental organizations, adopted a resolution approving issuance of an appealable CDP, with direction to District staff to work with these environmental organizations during the ten-day appeal period in an attempt to resolve their concerns and thereby avoid an appeal of the CDP;

WHEREAS, the District has pending before the Regional Board an application for Waste Discharge Requirements and a Clean Water Act § 401 Water Quality Certification Permit for the Proposed Project, and pending before the U.S. Army Corps of Engineers a Clean Water Act § 404 In-Water Work Permit, all approvals of which are required in order to proceed with the Proposed Project;

WHEREAS, Baykeeper and Surfrider have taken the position that contaminated sediments in San Diego Bay must be cleaned up to "background levels" unless the discharger can show that such remediation is technologically or economically infeasible, and they further believe that more prescriptive cleanup levels can be required for the Proposed Project via the 401 water quality certification process before the Regional Board; and,

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WHEREAS, the parties nevertheless agree that a compromise of their positions that allows the Proposed Project to move forward in a timely manner is in the best interest of both parties and is consistent with the District's obligations as a steward of San Diego Bay.

THE PARTIES HEREBY AGREE AS FOLLOWS:

1. Baykeeper and Surfrider agree that, in exchange for the District agreeing to implement the changes described below regarding the construction and maintenance of the Proposed Project, Baykeeper and Surfrider will forego their right to appeal the CDP issued for the Proposed Project, and further agree that neither organization will oppose, either orally or in writing, the Proposed Project in any forum available for such a challenge as a result of the District's pending applications for the Proposed Project before the Regional Board and the U.S. Army Corps of Engineers. In addition, Baykeeper and Surfrider agree to use best reasonable efforts to obtain, from other environmental organizations that form the coalition known as the Bay Council, support for the agreement set forth in this MOU.

2. In exchange for the agreement of Baykeeper and Surfrider set forth in Paragraph 1, above, the District agrees to implement the following modifications to its Proposed Project:

a. The parties will establish a Technical Advisory Committee ("TAC") for the purpose of designing a Long-Term Post-Construction Monitoring Program. The TAC will include, at a minimum, representatives of Baykeeper and Surfrider, or their designees, and representatives of the US Fish and Wildlife Service and the National Marine Fisheries Service (collectively "Resource Agencies"), or their designees and, at the District's discretion, up to an equivalent number of District representatives. Should either or both of the Resource Agencies decline invitation to participate on the TAC, such absence shall not constitute violation of this agreement. The parties have agreed to the following elements of such a Program:

i. The parties agree that, if certain Action Levels, as set forth in Paragraph 3, below, are met or exceeded, within the surface of the cap, the District will be required to conduct a study to determine whether the elevated levels have been caused by failure in the design or construction of the cap, loss of integrity of the cap, or by background conditions. In the event it is determined there has been a failure in the design or construction, or a breach of the cap, the District will develop and execute a remediation plan designed to restore the cap to its originally intended effectiveness.

ii. The District will install piezometers into the sand layer of the cap to facilitate monitoring events. The number of piezometers to be installed will be determined by the TAC. At a minimum, pore water and sediment sampling will be done to assess cap effectiveness in containing contaminants. Sediment monitoring over the armored cap portion will be limited to sampling of sediment media installed in piezometers.

iii. The TAC will determine the frequency of monitoring, and the parties have tentatively agreed upon quarterly monitoring for years one and two, and annual monitoring thereafter with the exception of every fifth year, when monitoring shall be quarterly. The parties will agree upon conditions that must occur before monitoring may be reduced to less than annual.

iv. For special events, as those are defined by the TAC (such as a significant seismic event, and certain level storms), the District shall conduct diver visual checks and other monitoring, as may be determined, to verify that the integrity of the cap has not been breached.

v. For those years when annual monitoring is required, such monitoring shall take place in March or April in order to measure the effect upon the cap, if any, of the rainy season.

vi. When sampling for PCBs and PAHs, measurements will be taken without filtering of bay water samples.

vii. For early detection of potential sloughing, diver visual checks and bathymetric monitoring will be conducted as part of the Monitoring Program. In addition, the TAC will recommend three or more places on the cap, with the steepest slopes, to be monitored specifically to determine whether sloughing has taken place. If it is determined that any portion of the cap has sloughed off, the District will promptly take steps to bring the cap back to its full effectiveness.

b. Prior to the deposition of the sand layer portion of the cap (with the exception of the habitat portion of the cap which will have as its first layer one foot of sand), a geotextile filter fabric will be secured over the contaminated sediments in order to stabilize the material and assist in construction of the cap. The filter fabric then will be overlain with two feet of sand, one foot of gravel, and two feet of armoring rocks as described in the environmental and engineering documents.

c. The District will use best reasonable efforts to conclude the dredging portion of the cap construction prior to May 15<sup>th</sup>, to avoid potential impacts to least terns during the least tern nesting season. If dredging is not complete by May 15<sup>th</sup>, the parties will confer with the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service to determine what, if any, additional least tern mitigation or monitoring is required.

d. No pile-supported wave reflector will be constructed to protect the habitat portion of the cap. In the event the District does not construct any wave reflector, however, and subsequent monitoring shows that propeller wash is preventing eelgrass colonization of the habitat area, the District agrees to construct a structure adequate to protect the habitat, but shall in no event drive piles through the cap in order to construct such a structure. Should the Resource Agencies recommend the use of piles in constructing the wave reflector, however, the parties agree to support such recommendation.

e. The District will prohibit, and enforce a prohibition against, anchoring and spudding on the cap (unless such activity is required to facilitate

emergency repair of the cap), and will agree to prohibit any activity in the future that is shown to physically damage the cap.

f. The cap will be designed consistent with the recommendations contained in the June, 2003, *Basis of Design White Paper-Cap-in-Place Alternative* contained in the Appendix of the FSEIR.

3. The Action Levels agreed upon by the parties, for purposes of Paragraph 2.a.i., above, are as follows:

<u>Constituent</u>	<u>Action Level</u>
Copper	264 ppm
Lead	88 ppm
Zinc	410 ppm
TPAH	3.47 ppm
PCBs	0.11 ppm
TPH	<14 ppm
Tributyltin	0.121 ppm .

4. This MOU constitutes the final, complete and exclusive agreement between the parties hereto pertaining to the subject matter contained in it. This agreement supersedes all prior and contemporaneous representations and understandings of the parties pertaining to the subject matter contained in it. No supplement, modification, or amendment to the MOU shall be binding unless executed in writing and signed by the parties hereto, expressly stating that modification is intended.

IN WITNESS HEREOF each of the parties has executed this MOU effective as of the date shown next to their signature.

DATED: 8/27/04

THE SAN DIEGO UNIFIED PORT DISTRICT



By: Bruce B. Hollingsworth  
Bruce B. Hollingsworth  
President/Executive Director, or his designee

DATED: 8/27/04

SAN DIEGO BAYKEEPER

By: [Signature]  
Bruce Reznik  
Executive Director

DATED: 8/27/04

SURFRIDER FOUNDATION, SAN DIEGO  
CHAPTER

By: [Signature]  
Marco A. Gonzalez  
Legal Advisor

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